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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900. 1902.

No. 353. 1902, 17.

THE LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 28, 1900.

(17,843.)

(17,843.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 358.

THE LOUISVILLE AND JEFFERSONVILLE FERRY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1900.

2 No. 2.

UNITED STATES OF AMERICA, *ss:*

To Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, thirty (30) days after the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Louisville & Jeffersonville Ferry Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Hazelrigg, chief justice of the court of appeals of the State of Kentucky, this 14 day of July, A. D. 1900.

JAMES H. HAZELRIGG,
Chief Justice of the Court of Appeals of the State of Kentucky.

3 I accept service for the Commonwealth July 17, 1900.

ROB'T J. BRECKINRIDGE,
Att'y General of Kentucky.

[Endorsed:] No. 2. L. & J. Ferry Co. *vs.* Commonwealth. Citation & copy. 1900, July 14, filed. Att.: S. J. Shackelford, C. C. A.

1 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 13th day of June, A. D. 1900, Chief Justice James H. Hazelrigg and Judges Thomas H. Paynter, A. R. Burnam, J. P. Hobson, B. L. D. Guffy, George Du Relle, & James D. White sitting.

LOUISVILLE & JEFFERSONVILLE FERRY COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee. } No. 2.

Be it remembered that heretofore, to wit, on the 30th day of December, A. D. 1898, the appellant, by its counsel, Humphrey & Davie, filed in the office of the clerk of the Kentucky court of appeals a transcript of record in words and figures following, to wit:

Pleas before the Hon. James E. Cantrill, Judge of the Franklin Circuit Court, in Above Action.

Franklin Circuit Court.

Filed August 27, 1898.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
LOUISVILLE & JEFFERSONVILLE FERRY Company, Defendant.
} #22353. Petition Ordinary.

2 The plaintiff, The Commonwealth of Kentucky, states that on and before the 15th day of September, 1893, the defendant, Louisville & Jeffersonville Ferry Company, was a corporation, organized and doing business under the laws of plaintiff, having and exercising privileges and franchises not allowed by law to natural persons, and as such corporation continued to exercise such privileges and franchises up to and including the time of the filing of this suit; that on the — day of ——, 189–, said defendant, through its superintendent & secretary, E. L. Dorsey, made and delivered to plaintiff's auditor of public accounts a statement, as of date September 15th, 1893, verified by said superintendent & secretary, as required by law, and showing the facts upon which, according to law, was to be based the valuation of defendant's franchise for taxation for the year 1894; says that by the law the plaintiff's said auditor of public accounts, its treasurer, and secretary of state are made and constituted a board of valuation and assessment, for the purpose, among other things, of fixing the value of corporate franchises for taxation under the laws of plaintiff. Said statement of defendant was, on the 12th day of March, 1898, laid before a majority, constituting a quorum to do business, of said board of valuation and assessment, and said board, having been duly qualified to discharge their duties as such, proceeded to value and assess the corporate franchise of said defendant within plaintiff's territorial limits and fixed its franchise value for assessment and taxation for the year 1894 at more than $66,886.00. A statement of said assessment and valuation was thereupon returned to the auditor of public accounts,

3 who, on the 12th day of March, 1898, notified said defendant of said assessment and valuation, the amount thereof, and the taxes due thereon. Within thirty days from the giving of said notice the defendant appeared before said board and asked a reduction of the said valuation, and introduced evidence in support of its contentions, and had a full and fair hearing before said board. After said hearing the matter was again submitted to the board, which board thereupon proceeded to and did fix, finally, the value of the corporate franchise within plaintiff's territorial limits for the year 1894 at $66,886.00. A statement of said assessment and valuation was thereupon returned to the auditor, who thereafter, on the 10th day of June, 1898, notified the defendant of said

final assessment and valuation, the amount thereof, and the taxes thereon due plaintiff for said year; which taxes amounted to $284.28, the tax rate as provided by law of plaintiff for said year being 42½ cents on each one hundred dollars' worth of taxable property within its territorial limits. Itemized statement showing said last-named valuation and taxes due thereon is filed herewith, marked "A." After the giving of said last-named notice the defendant failed to further protest or object to said valuation and assessment and same became final and binding. The said taxes were due and payable to plaintiff's treasurer, at his office in Frankfort, Franklin county, Kentucky, on or before the 10th day of July, 1898, but the defendant has failed and refused to pay same or any part thereof, nor has any part of same ever been paid; and the defendant, having failed to pay said taxes or any part thereof after receiving thirty days' notice of said valuation and assessment, as aforesaid, therefore became indebted and liable to plaintiff in the further sum of $28.42, the ten per cent penalty on said taxes as provided by law on
4 account of such delinquencies. Plaintiff is entitled to interest on said taxes from the date same were due, at the rate of ten per cent. per annum, until paid.

The plaintiff further says that by reason of the defendant's failure to pay said taxes, interest, and penalty, as hereinbefore set out, the said defendant became delinquent on the 11th day of July, 1898, and so continued ever since, all as aforesaid, and guilty of a misdemeanor committed in Franklin county, Kentucky, and is therefore liable and indebted to the plaintiff in the further sum of $50.00 per day for each day during the period of said delinquency. Said delinquency has continued for more than 46 days, and the defendant is therefore indebted to plaintiff in the further sum of $2,300.00.

Wherefore plaintiff prays judgment against the defendant for $284.28 in taxes, with interest thereon, at the rate of ten per cent. per annum, from the date of maturity until paid, and for $28.42, the ten per cent. penalty on said taxes, and for the sum of $2,300.00, the $50.00 per day penalty for 46 days, and for its costs and all proper relief.

W. S. TAYLOR,
Attorney General.
M. H. THATCHER, *Of Counsel.*

5 *Tax Statement.*

"A."

Corporations.

State of Kentucky, office auditor public accounts.

FRANKFORT, *Aug. 20th*, 1898.

Louisville & Jeffersonville Ferry Co., Louisville, Ky., Dr., to State of Kentucky.

Report as of September 15th, 1893, to Taxes 1894.

Total capital	$121,050.00
Tangible property	54,164.00
Total valuation	$66,886.00
At 42½ on each $100:	
Amount of tax	$284.28

1st notice sent March 12th, 1898.
2nd " " June 10th, 1898.

6 Franklin Circuit Court.

Filed September 13th, 1898.

COMMONWEALTH OF KY.
v.
LOUISVILLE & JEFFERSONVILLE FERRY CO. } # 22352.

SAME
v.
SAME. } # 22353.

SAME
v.
SAME. } # 22354.

SAME
v.
SAME. } # 22355.

SAME
v.
SAME. } # 22356.

SAME
v.
SAME. } # 22357.

} Order.

On motion of attorney for plaintiff in each of the above-styled causes, ordered that plaintiff's claim for a penalty of fifty dollars per day in each case be dismissed without prejudice.

Thereupon came defendant in each of said causes and tendered their answers, which are ordered to be filed.

Then came plaintiff and tendered a demurrer in each of said cases to said answers, which are ordered to be filed, and said causes are now each submitted on demurrer.

Franklin Circuit Court.

Filed September 13th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
LOUISVILLE & JEFFERSONVILLE FERRY CO., Defendant.
} Answer. #22353.

The defendant, The Louisville and Jeffersonville Ferry Company, in answer to the petition herein, says that it denies that it is indebted to the plaintiff in the sum of $284.28, or 10 per cent. thereon, or any penalty or any part of either of said sums, for that the defendant says:

(1.) There was no power or authority in the board of valuation and assessment to make the assessment upon which the tax sued for is based at the time it made the same, the time having passed in which the said board had any right to make such assessment.

This defendant further says that all of its tangible property in Kentucky was assessed by the assessor of Jefferson county in the fall of 1893 for the State tax for the year 1894, and the defendant paid the said tax. The property so assessed by the sheriff of Jefferson county consisted of all of the boats and other personal property of this defendant, the defendant having no real estate in this State.

For the same year all of the real estate owned by this defendant in Indiana was assessed by the authorities of that State, and the defendant paid the tax thereon.

The defendant had no intangible property except the franchise hereinafter described.

The board of valuation and assessment ascertained what had been the net earnings of the defendant up to September 15th, 1893, for the year preceding that date. It then capitalized said net earnings at 6 per cent.—that is, to have been such an amount as at 6 per cent. would produce the sum of $121,050.00. From this the board deducted $54,164.00, being the assessed value of the defendant's property in Kentucky and Indiana, leaving the sum of $66,886.00 as the value of defendant's franchise.

This defendant says that it is a ferry company engaged in the transportation of passengers and freight between Louisville, Kentucky, and Jeffersonville, Indiana, and other points in Indiana; that substantially its whole revenue is derived from interstate commerce, and its net returns upon which the above capitalization was made represent its gains from interstate commerce—that is, from the carriage of persons and property between the States of Indiana and Kentucky.

Defendant states that in 1802 William Henry Harrison, then governor and commander-in-chief of the Indiana Territory, made a grant or license to Marsden G. Clark for a ferry, thereby granting to him a license to keep a ferry at Jeffersonville, in the county of Clark, Territory of Indiana, for the transportation of passengers, carriages, horses, and cattle across the Ohio river at said place.

In the year 1820 an act was passed by the Indiana legislature reciting that one George White, of Jeffersonville, in the county of Clark and State of Indiana, had purchased a certain ferry from one Samuel Meriwether, and thereupon it was enacted by the said General Assembly of the State of Indiana as follows:

That the said George White be, and he is hereby and hereafter, authorized to keep a ferry in said town of Jeffersonville and to ferry off and from any portion of the public grant or commons in said town lying along or bordering upon the Ohio river across
9 the said river to the opposite shore or mouth of Bear Grass creek.

The mouth of Bear Grass creek mentioned in this act was at that time and still is within the corporate limits of the city of Louisville and within 150 or 200 yards from where this defendant now lands its ferry-boats in the State of Kentucky.

In the year 1802 William Henry Harrison, governor and commander-in-chief of the Indiana Territory, granted to Joseph Bowman a license to keep a ferry from the landing near the spring in the town of Jeffersonville across the Ohio river to the public road at the mouth of Bear Grass creek, on the said Joseph Bowman engaging to keep good and sufficient boats at all lawful hours for the passage of all travelers with their wagons, carts, carriages, horses, etc.

The defendant says that these three ferry franchises by regular devolution of title, sometimes by inheritance and sometimes by conveyances duly reported, came to be owned in the year 1865 by John Shallcross, Moses Brown, Hiram Mayberry, James Wathen, A. Wathen, Charles Woolfolk & Co., J. B. Smith, W. C. Hite, E. S. Hoffman, P. Varble, and Daniel Park, and during all these years ferries had been maintained, all the three franchises having, about the year 1837, vested in A. Wathen, Charles Strader, John Shallcross, and James Thompson, under whom the persons just above named derived their title through sundry mesne conveyances.

Under date of March 29, 1865, the persons then the owners of the ferry associated themselves in a partnership for the purpose
10 of operating the same and continued to operate it until on the 29th day of March, 1869, the legislature of the State of Kentucky passed an act entitled "An act to incorporate the Louisville & Jeffersonville Ferry Company," which is this defendant.

By the seventh clause of said act it is provided that said corporation may purchase from any existing ferry company or associations any ferry, boats, wharves, and ferry franchises from any ferry or ferries between Louisville and Jeffersonville, and upon the purchase of all such existing franchises shall have the right to carry on and conduct a ferry or ferries between said States.

By the eighth clause it was provided that said corporation may

accept such boats and franchises and wharves and other property in payment of stock subscribed and at such prices as may be agreed upon.

Under this act the defendant's corporate organization was perfected and it procured to be conveyed to itself the above-mentioned ferry, franchises, with the boats then owned by the partnership, and issued therefor its fully paid capital stock for $200,000. The boats and personal property so acquired were of no great value, the principal worth consisting in the franchises so acquired as above.

The boats now owned by it and also the boats which were owned by it in the year 1893 were regularly enrolled, under the laws of the United States, at the port of Louisville and were assessed, as above stated, by the sheriff of Jefferson county, in the fall of that year, and the tax paid upon them in the year 1894.

This defendant, in the year 1887, made a contract with the
11 sinking-fund commissioners of the city of Louisville, a corporation having charge of certain fiscal affairs of the said city, under which the defendant leased the ferry privileges in said city, and agreed to pay for the ferry privileges and taxes $800 a year and a wharfage fee annually of $400. This contract, by its terms, will expire January 1, 1902.

The defendant says that the only ferry franchises owned by it are those above mentioned, which were granted by the authorities of the State of Indiana.

The defendant says it brought before the board of valuation and assessment, before that board had made its assessment final, the fact that its whole capital stock had been issued in consideration of the transfer of the said ferry franchises granted by the State of Indiana and attendant property, and showed that all its property had been assessed as above explained and protested against any assessment being made upon its franchises as being beyond the jurisdiction of the said board and outside of the territorial jurisdiction of the State of Kentucky, and not taxable in Kentucky; and it protested against the said board making any valuation whatever of its capital stock because all of its property had been once assessed and any valuation made upon its capital stock would include alone these franchises and profits resulting to the defendant from engaging in interstate commerce; and the defendant further requested the said board, if it should insist upon making a valuation upon its capital stock, to deduct therefrom the value of these franchises. The said board refused to enter into the question of the valuation of the said franchise granted by the State of Indiana, as aforesaid, and owned
12 and operated by this defendant, and refused to regard the fact that the profits which were earned by this defendant came from interstate commerce.

The defendant says that the State board of valuation and assessment in making the assessment sued on has disregarded the Constitution of the United States, and especially the clause giving to Congress the power to regulate commerce between the States, and has also disregarded the Constitution of the United States, and particularly the fourteenth amendment, in that it has included in its

assessment for Kentucky taxation franchises derived from the State of Indiana and there exercised.

The defendant says that the said board of valuation persisted, as above stated, in taking the net earnings of this defendant, capitalizing these earnings at six per cent. and fixing the value of its capital stock at this sum, and only deducting therefrom the value of its tangible property as assessed in Kentucky and Indiana; all of which is contrary to law and right and in violation of the Constitution of the United States and the laws passed in pursuance thereof, and the said assessment is therefore illegal and void.

Wherefore defendant prays that the petition may be herein dismissed, and for all proper relief.

HUMPHREY & DAVIE,
For Defendant.

Franklin Circuit Court.

Filed September 13th, 1898.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
13 LOUISVILLE & JEFFERSONVILLE FERRY Co., Defendant. } # 22353. Demurrer.

Plaintiff demurs to the answer of defendant, because same does not state facts sufficient to constitute a defense, and prays the judgment of the court.

W. S. TAYLOR,
Att'y General.

Franklin Circuit Court, September 21st, 1898.

SAME, Plaintiff,
vs.
SAME, Defendant. } # 22353. Order.

Ordered that this cause be assigned for next Friday (16th day of term) for hearing on demurrer to answer.

Franklin Circuit Court, October 1st, 1898.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
LOUISVILLE & JEFFERSONVILLE FERRY Company, Defendant. } # 22353. Judgment.

This cause having been submitted on demurrer to answer herein, and the court, being sufficiently advised thereon, orders that
14 same be sustained, with leave to defendant to amend; to which ruling of the court in sustaining the demurrer the defendant excepts.

Thereupon the defendant asked leave to amend his answer by

the insertion of these words, "The defendant had no intangible property except the franchises hereinafter described," immediately preceding the expression "the board of valuation and assessment," in the second paragraph of first page of answer. The plaintiff assenting thereto, such leave is given and such amendment made.

Then plaintiff renewed its demurrer to the answer as amended, and the court, being advised thereon, orders that same again be sustained; to which ruling of the court the defendant excepts.

Thereupon, the defendant declining to further plead, and the cause being submitted, and the court being sufficiently advised, it is adjudged that the plaintiff, The Commonwealth of Kentucky, recover of the defendant, Louisville and Jeffersonville Ferry Company, the sum of two hundred eighty-four $\frac{28}{100}$ dollars ($284.28), with ten per cent. interest per annum thereon from the 10th day of July, 1898, until paid, and the further sum of twenty-eight and $\frac{42}{100}$ dollars ($28.42), being the ten per cent. penalty on said taxes on account of delinquency, as set out in the petition; also recover its costs herein expended.

To all of which the defendant excepts and objects, and prays an appeal to the court of appeals, which is granted.

15 *Supersedeas Bond.*

THE COMMONWEALTH OF KENTUCKY:

Franklin Circuit Court.

LOUISVILLE & JEFFERSONVILLE FERRY CO., Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee. } No. 22353.

Upon an appeal from a judgment of the Franklin circuit court rendered 1st day of October, 1898.

Whereas said appellant, Louisville & Jeffersonville Ferry Co., took an appeal from the judgment of the Franklin circuit court, rendered at its September term, 1898, against said company in favor of the appellee for the sum of ($284.28), two hundred and eighty-four & $\frac{28}{100}$ dollars, with interest, at 10 per cent., from 10th July, 1898, and the further sum of ($28.42), twenty-eight & $\frac{42}{100}$ dollars (ten per cent. penalty on same), and the appellant desires to supersede the collection of the said judgment above mentioned:

Now we, W. W. Hite, surety, do hereby covenant to and with the appellee, Commonwealth of Kentucky, that the appellant will pay the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the aforesaid judgment above stated in case it shall be affirmed and any judgment or order which the court of appeals may render or order to be rendered by the inferior court not exceeding in amount or value the said judgment aforesaid, and also pay all rents, hire, or damage which during the pendency of the appeal

may accrue on any part of the property of which the appellee
16 is kept out of possession by reason of the appeal.
Witness our hands this 8th day of December, 1898.

LOUISVILLE & JEFFERSONVILLE
FERRY CO.,
By W. W. HITE, *President.*
W. W. HITE.

Attest: THOS. B. FORD, *C. F. C. C.*

STATE OF KENTUCKY, }
County of Franklin, } *sct:*

I, Thos. B. Ford, clerk of the Franklin circuit court, certify that the foregoing 14 pages contain a true and complete transcript of the case of The Commonwealth of Kentucky, plaintiff, *vs.* Louisville and Jeffersonville Ferry Company, defendant, # 22353, as appears from the records of the Franklin circuit court.

Witness my hand as clerk of said court this 15th day of December, 1898.

THOS. B. FORD, *C. F. C. C.*,
By J. R. ELLIOTT, *D. C.*

The following statement was endorsed on said transcript:

The appeal is from the judgment on page 13 of this transcript rendered Oct. 1st, 1898.

17 Afterwards, at a court of appeals held, as aforesaid, on May 23, 1899, the following order was entered:

LOUISVILLE & JEFFERSONVILLE FERRY CO. *vs.* COMMONWEALTH OF KENTUCKY. } Franklin.

Ordered that this cause be submitted.

Afterwards, at a court of appeals held, as aforesaid, on the 13th day of June, A. D. 1900, the following judgment was entered herein:

LOUISVILLE & JEFFERSONVILLE FERRY Company, Appellant, *vs.* COMMONWEALTH OF KENTUCKY, Appellee. } Appeal from a Judgment of the Franklin Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that the appellee recover of the appellant ten per cent. damages on the amount of the judgment herein superseded, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

On the same day said court, through Judge Paynter, delivered the following opinion:

18 Court of Appeals of Kentucky, June 13, 1900.

LOUISVILLE & JEFFERSONVILLE FERRY CO., Appellant, vs. COMMONWEALTH OF KENTUCKY, Appellee. } No. 2.

SAME, Appellant, v. SAME, Appellee. } No. 3.

SAME, Appellant, v. SAME, Appellee. } No. 4.

SAME, Appellant, v. SAME, Appellee. } No. 5.

SAME, Appellant, v. SAME, Appellee. } No. 6.

Appeal from Franklin circuit court.

Opinion of the Court, by Paynter, J.

The judgments from which the appeals are prosecuted are for the franchise tax for the years of 1894, 1895, 1896, 1897, and 1898. The appellant is a corporation organized under a special act of the legislature passed in 1869. It purchased a ferry franchise, which had been originally granted by the territorial authorities of Indiana, which authorized the original grantee to conduct a ferry busi-
19 ness across the Ohio river from Indiana to Kentucky. By regular devolution of title, through descents and conveyances, appellant owns the rights thus granted. The franchise thus acquired authorizes the appellant to transport persons and property from Jeffersonville, Indiana, to Louisville, Kentucky. There was vested in the sinking-fund commissioners of the city of Louisville title to the ferry rights along the Ohio river within the boundaries of that city, and by an agreement with them the appellant became the owner of it. The appellant owned certain ferry-boats which are enrolled at the port of Louisville. It owned certain real estate in the State of Indiana. It has paid its taxes upon its real property in Indiana and upon its personal property in this State. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The board of valuation and assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting anything from that value on ac-

count of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that State.

On behalf of appellant it is urged (1) that the franchises belonging to the corporation derived by it from the State of Indiana is an incorporeal hereditament, whose location is in the State of Indiana and which cannot be taxed by the State of Kentucky, nor can its value be included in any tax *in* which the State of Kentucky endeavors to exact from it; (2) that as the revenues of the corporation are derived from the exercise of two independent franchises, one having its source from the State of Kentucky and the other having its source from the State of Indiana, only so much of the value assessed as comes from the exercise of the Kentucky franchise can be taxed; (3) that as the franchise of the corporation is solely employed in the business of interstate commerce, the revenues from the exercise of that franchise are not subject to State taxation, nor can they be made the basis of an assessment for the purpose of State taxation; (4) that the assessments not having been made within the years during which the taxes were due and payable, the board of valuation and assessment could not make the assessment—in other words, has no right to retrospectively assess.

We will consider the first and second objections together. We deem it unnecessary to enter into a consideration as to the meaning of the eleventh article of the compact with Virginia. It is sufficient to say that in Newport, &c., *v.* Taylor's Ex'rs, 16 Ben Mon., 784, and Reeves *v.* Little, 7 Bush., 469, this court has held that the State of Kentucky has the right to grant a ferry franchise for the transportation of persons and property to the States on the northern side of the Ohio river, and that she has never attempted to exercise the right to grant a ferry franchise for the transportation of persons or property from northern shore of the Ohio river to the Kentucky shore, but the statutes of Kentucky only attempted to regulate the transportation of persons and property from this State's northern boundary to the opposite shore of the Ohio river. From our view of the question here involved, it is unnecessary to enter into a consideration of the question as to the right which the State of Kentucky might exercise in the matter of regulating transportation of persons and property across the Ohio river from its northern to its southern shore. The appellant is a Kentucky corporation. The board of valuation and assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the Ohio river; but under certain sections of the Kentucky statutes it assessed the value of appellant's franchise, which is its intangible property. The board did not assess or attempt to assess the property, either tangible *or* intangible, which it owned in the State of Indiana.

By virtue of its corporate authority the appellant acquired ferry-boats, the ferry rights, within the city of Louisville, which included the right to transport persons and property from Kentucky to In-

diana over the Ohio river, and the necessary use of its wharf to carry on that business. It also by contract (which its charter seems to have authorized it to do) acquired wharf privileges on the Indiana side, and also the right which had been previously granted by Indiana to transport persons and property from Indiana to Kentucky over the Ohio river. It also owns a park in Indiana. The property thus acquired constituted all of its property, tangible and intangible, in Kentucky and Indiana. Having thus acquired the foregoing property and having profitably used it, its corporate franchise presumably became of the value fixed by the board
22 of valuation and assessment. If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same, whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase which is sought to be taxed, but the value of its franchise which has been created in and now exists in Kentucky.

We do not think the case of Henderson Bridge Co. *v.* Commonwealth, 99 Ky., 623, is in conflict with the views here expressed. There the Commonwealth only attempted to tax its franchise to low-water mark on the Indiana side. This was done because that part of the bridge which was in the State of Indiana was constructed under a charter from the State of Indiana and presumably held and operated by virtue of it.

There is no doubt but what the business which the appellant carries on may be properly designated as interstate commerce, and that it is a subject of national character, Congress having the authority and the power under the Constitution to regulate it. The State of Kentucky is not attempting to impose a tax upon receiving and handling persons and property, but is simply attempting to collect a franchise tax on the corporation created by law. As authorized by the laws and Constitution, the State is entitled to impose a tax upon its tangible property.

The Supreme Court, in Gloucester Ferry Company *v.* Pennsylvania, 114 U. S., 206, said: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as
23 the property of corporations engaged in other business, is subject to State taxation, provided, always, it be within the jurisdiction of the State."

In Morgan *v.* Parham, 16 Wall., 471, it was held that a vessel registered in New York was not subject to taxation in Alabama, though engaged in commerce as one of a regular line of steamers between Mobile, in that State, and New Orleans, in Louisiana. In that case the court said: "It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States, with its situs at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value."

If the State was attempting to impose a tax upon the gross receipts or revenues of the appellant it might be plausibly argued that it was a tax imposed upon interstate commerce, for it was held in Philadelphia and Southern Steamship Company *v.* Pennsylvania, 122 U. S., 326, that a State tax upon the gross receipts of the steamship company incorporated under its laws which are derived from the transportation of persons and property by sea between different States is a regulation of interstate commerce in conflict with the exclusive powers of Congress under the Constitution, but the court (345) said: "The corporate franchises, the property, the business,
* the income of corporations created by a State may undoubt-
24 edly be taxed by the State; but in imposing such taxes care
should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal Government."

In Henderson Bridge Company *v.* Kentucky, 166 U. S., 154, the court said: "The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in Erie Railroad *v.* Pennsylvania, 158 U. S., 431, 439, where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance.'"

The appellant is domiciled in Kentucky and the property sought to be taxed has its situs in Kentucky, and, as we have said, there is no attempt to tax the appellant's business, income, or revenue, but its income is alone considered in fixing the value of its franchise. The board of valuation and assessment has the right to make retrospective assessments. Section 4090, Kentucky Statutes, reads as follows: "Should any corporation fail to make the reports
* as required herein on or before the first day of October of
25 each year, the said board shall proceed to ascertain the facts
and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the values of the corporate franchise liable for taxation as aforesaid, and the corporation shall be taxed accordingly." By this section, if the reports are not made within the time prescribed by law, the board may proceed to ascertain the facts and values as required by the article, and in our opinion it was intended by this section that they should exercise this power at any time. Besides, section 4077 provides that the auditor may call the board of valuation and assessment together from time to time as the business of the board may require. This indicates that they may have meetings at any time to discharge the duty imposed upon them by law, among which is the duty of assess-

ing franchises when no reports are made. Section 4241 imposes a duty upon the sheriff and auditor's agent, but does not interfere with the power of the board to make the assessments as in this case. If they fail to do so and the sheriff or auditor's agent should attempt to have the assessment made, then the question would arise as to their authority to do so. Until such question arises we forbear to express an opinion on it.

The judgments are affirmed.

25a Afterwards, on the — day of July, 1900, the appellant, by its counsel, filed in the clerk's office of said court of appeals its writ of error, as follows (a copy of which is retained and on file in said clerk's office):

26 No. 2.

UNITED STATES OF AMERICA, *District of Kentucky, Sixth Judicial Circuit,* } ss:

The President of the United States to the honorable the judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals *court*, before you or some of you, between The Louisville & Jeffersonville Ferry Company, a corporation, as appellant, and The Commonwealth of Kentucky, as appellee, a manifest error hath happened, to the great damage of the said Louisville & Jeffersonville Ferry Company, as by its complaint appears, and wherein it is claimed its certain rights and privileges under the Constitution of the United States were decided against by your said court, and that your said court decided in favor of a certain authority exercised under the State of Kentucky, and which said authority and the exercise thereof were repugnant to the Constitution of the United States, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the* 13 day of August next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

United States, the 14 day of July, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fifth.

THOS. SPEED,
Clerk of the Circuit Court of the United States, Kentucky District.
By HENRY F. CASSIN,
Deputy Clerk.

Allowed by—
JAMES H. HAZELRIGG,
Chief Justice of Court of Appeals of Kentucky.

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*Not exceeding 30 days from the day of signing the citation.

[Endorsed:] 1900, July 14, filed. Att.: S. J. Shackelford, C. C. A.

27 On the same day the appellant and plaintiff in error filed in said clerk's office its bond and power of attorney to surety to sign same; which bond and power are in words and figures following, to wit:

Court of Appeals of Kentucky.

LOUISVILLE & JEFFERSONVILLE FERRY COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Know all men by these presents that we, The Louisville & Jeffersonville Ferry Company, a corporation organized and existing under the laws of the State of Kentucky, as principal, and W. W. Hite, by Alex. P. Humphrey, his attorney-in-fact, as surety, are held and firmly bound unto the Commonwealth of Kentucky, its successors and assigns, in the sum of one thousand dollars; for the payment of which, well and truly to be made, we, The Louisville & Jeffersonville Ferry Company, for itself, its successors and assigns, and the said W. W. Hite, his heirs, executors, and administrators, bind ourselves, jointly and severally, firmly by these presents.

Witness our hands and seals this July 14, 1900.

The condition of this obligation is such that whereas the said Commonwealth of Kentucky instituted a certain action against the said Louisville & Jeffersonville Ferry Company in the Franklin circuit court, claiming a certain sum of money, and obtained
28 judgment therefor, and subsequently an appeal was taken from the said judgment to the court of appeals of Kentucky, which affirmed the same; and whereas the said Louisville & Jeffersonville Ferry Company has sued out a writ of error from the Supreme Court of the United States to reverse the said judgment of the court of appeals of Kentucky:

Now, therefore, if the above-bounden Louisville & Jeffersonville Ferry Company shall *procure* said writ of error to affect and answer all damages and costs if it fail to make good its appeal, then this obligation shall be void; otherwise remain in full force and effect.

LOUISVILLE & JEFFERSONVILLE FERRY COMPANY,
By ALEX. P. HUMPHREY, *Attorney.*
W. W. HITE, *Surety,*
By ALEX. P. HUMPHREY,
Attorney-in-fact.

The above and foregoing bond is approved this 14 day of July, 1900.

JAMES H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

(NOTE.—The power of attorney is copied in Record No. 1, same style as this case and heard with it.)

29 On the same day the appellant and plaintiff in error filed in said clerk's office the following assignment- of error:

In the Supreme Court of the United States.

LOUISVILLE & JEFFERSONVILLE FERRY CO., a Corporation, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Writ of error to the court of appeals of the State of Kentucky.

Assignments of Error.

The plaintiff in error, The Louisville & Jeffersonville Ferry Company, by Alexander Pope Humphrey, its attorney, this 14th day of July, 1900, shows that in the record of proceedings in the above-entitled cause there is manifest error in this, to wit:

1. The said court of appeals of Kentucky erred in deciding that the board of valuation and assessment had the right to consider as part of the property or as entering into the value of the franchise of the plaintiff in error its right and franchise to operate a ferry from the State of Indiana to the State of Kentucky.

2. The court of appeals of Kentucky erred in deciding that
30 the law under which the board of valuation and assessment acted authorized it to take into consideration, in fixing the value of the capital stock of the plaintiff in error, the franchise which has been conveyed to it and which it owned for operating a ferry from the State of Indiana to the State of Kentucky.

3. The said court of appeals of Kentucky erred in deciding that the board of valuation and assessment had the right, in fixing the value of the capital stock of the plaintiff or the value of the franchise of the plaintiff, to consider the earnings made by it in transporting

persons and property from Kentucky to Indiana and from Indiana to Kentucky, the same being interstate commerce.

4. The court of appeals of Kentucky erred in deciding that the board of valuation and assessment did not, in fixing the assessment of the plaintiff in error, violate the Constitution of the United States, particularly that clause thereof conferring upon Congress the right to regulate commerce between the States.

5. The court of appeals of Kentucky erred in failing to hold that the board of valuation and assessment, in fixing the assessment of the plaintiff in error, did not violate the Constitution of the United States, and particularly the fourteenth amendment thereof, and did not deprive the plaintiff in error of its property without due process of law.

6. The said court of appeals of Kentucky erred in rendering judgment in said cause in favor of the defendant in error and against the plaintiff in error.

Wherefore the plaintiff in error, The Louisville & Jeffersonville Ferry Company, prays that the judgment of the said court of
31 appeals of Kentucky may be reversed by this honorable court and this cause remanded to the said court of appeals of Kentucky, with directions to send down its mandate to Franklin circuit court, directing it to dismiss the petition against the plaintiff in error.

ALEX. POPE HUMPHREY.

COMMONWEALTH OF KENTUCKY, *sct:*

Court of Appeals.

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, certify that the preceding 30 pages contain a true, full, and complete transcript of the record and proceedings had in the case of Louisville & Jeffersonville Ferry Company, appellant, *vs.* The Commonwealth of Kentucky, appellee, upon appeal from a judgment of the Franklin circuit court, together with the original citation and writ of error and copies of the bond and assignment of error, as the same appear of record and on file in my office.

Seal Kentucky Court of Appeals.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 19th day of July, A. D. 1900.

SAMUEL J. SHACKELFORD,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $9.50.

Endorsed on cover: File No., 17,843. Kentucky court of appeals. Term No., 358. The Louisville and Jeffersonville Ferry Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed July 28, 1900.